No. 84-688

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CAROL JEAN VOSCH, executrix of the last will of CHARLES LOWRY, deceased, DAVID GAIBIS, and others similarly situated,

Petitioners

v.

WERNER CONTINENTAL, INC.

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether an individual employee may institute a civil action against his employer under Section 301(a) of the Labor Management Relations Act, as amended, 29 U.S.C. §185(a), seeking to vacate a final and binding arbitration award in the absence of any allegation of a breach of the duty of fair representation by his union in the course of the arbitration proceedings?

PARTIES TO THE PROCEEDING

Respondent Werner Continental, Inc. was acquired by Hall's Motor Transit Company on January 1, 1979, and the companies thereafter have done business as a single entity known as Hall's Motor Transit Company (hereinafter referred to collectively as "Hall's"). Hall's is a wholly owned subsidiary of Tiger International, Inc. Petitioners are Carol Jean Vosch, executrix of the estate of Charles Lowry, a former employee of Hall's, and David Gaibis, another former employee of Hall's.

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CITATION OF OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit has been reported at 734 F.2d 149 (3d Cir. 1984). The Opinion of the United States District Court for the Western District of Pennsylvania has been reported *sub nom Gaibis v. Werner Continental, Inc.*, 565 F.Supp. 1538 (W.D. Pa. 1983).

JURISDICTION

The judgment of the Court of Appeals was entered on May 14, 1984 and a petition for rehearing in banc was

denied on June 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §185(a), June 23, 1947, c. 120, Title III, §301(a), 61 Stat. 156:

> Suits by and against labor organizations (a) Venue, amount, and citizenship
>
> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. §173(d), June 23, 1947, c. 120, Title II, §203(d), 61 Stat. 153, as amended Pub.L. 95-524, §66(c)(1), October 27, 1978, 92 Stat. 2020:

> (d) Use of conciliation and mediation services as last resort.
>
> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. . . .

STATEMENT OF THE CASE

Hall's is a common freight carrier which operates a number of trucking terminals throughout the eastern half of the United States.[1] Prior to their discharge, Gaibis and Lowry were employed as over-the-road truck drivers dom-

1. As noted above, Werner Continental, Inc. shall be referred to herein as "Hall's".

iciled at Hall's West Middlesex, Pennsylvania freight terminal. They were members of Teamsters Local 261, and were subject to the provisions of the collective bargaining agreement known as the National Master Freight Agreement and Teamsters Joint Council No. 40 Over-The-Road Supplemental Agreement. That collective bargaining agreement contains a comprehensive grievance and arbitration procedure, which culminates in a final and binding decision either by a joint union/management committee or by an independent arbitrator.

Gaibis and Lowry were employed subject to work rules which involve, *inter alia*, a seniority-based dispatch procedure. Pursuant to that procedure, over-the-road drivers are called for dispatch based on seniority, and are required to appear for work within two hours after receiving telephone notification of dispatch. The collective bargaining agreement expressly authorizes discipline, up to and including discharge, for "chronic and habitual absenteeism." That phrase has been consistently interpreted by the joint committees created by the labor contract as including chronic unavailability for telephone dispatch. After a long history of progressive discipline, both Gaibis and Lowry were eventually discharged for chronic and habitual absenteeism, as a result of their continued refusal to make themselves available for work. The discharges were upheld in final and binding decisions under the grievance and arbitration procedure of the contract.

For many years prior to his discharge, Gaibis had complained in letters to the Bureau of Motor Carrier Safety ("BMCS"), an agency of the Federal Highway Administration of the Department of Transportation, that Hall's dispatch procedure, as well as its mandated procedures for the maintenance of a road driver's daily log book, violated the Federal Motor Carrier Safety Regulations ("FMCSR"). Several investigations of Hall's dispatch and logging procedures were precipitated as a result of the complaints of Gaibis, and in each case Hall's

was found to be in complete compliance with the FMCSR. Neither Gaibis nor Lowry ever filed a formal complaint against Hall's with the BMCS prior to instituting this action in the district court.

The action in the district court was commenced on October 23, 1978. The Complaint, as thereafter amended, alleged that Hall's dispatch and logging procedure, as well as the discipline taken by Hall's for chronic and habitual absenteeism, including the discharges of Gaibis and Lowry, violated the collective bargaining agreement, the Interstate Commerce Act, and the FMCSR. The Complaint sought, *inter alia*, an order vacating all of the arbitration awards in question, an award of back pay and other appropriate relief to the affected employees; reinstatement of Gaibis and Lowry; and an order enjoining Hall's from violating the FMCSR. Hall's moved to dismiss the original Complaint and all subsequent amendments to it. It also sought, alternatively, an Order from the district court deferring the regulatory issues raised by the Complaint to the BMCS under the doctrine of primary jurisdiction. On April 27, 1981, the district court granted that aspect of the Motion, and referred certain issues to the BMCS for resolution in accordance with its Rules of Practice and Procedure.

Pursuant to the court's order, an administrative law judge conducted a hearing on those issues in September, 1981, at which all parties were given the opportunity to present testimony and written submissions. He thereafter filed a Recommended Decision on January 22, 1982. Both parties filed exceptions to the Recommended Decision, which was then reviewed by the Associate Administrator for Safety of the Federal Highway Administration, whose decision constitutes final agency action pursuant to the Rules of Practice and Procedure of the BMCS, 49 C.F.R. §386. The Associate Administrator issued a Final Decision on March 29, 1982, in which he concluded that Hall's dispatch and logging procedure was

in full compliance with the FMCSR.[2]

On a Petition for Reconsideration filed by Gaibis and Lowry, the final Decision was upheld by the Associate Administrator for Safety on May 27, 1982.[3]

The Final Decision of the BMCS was then transmitted to the district court. Contrary to the administrative decision, the district court concluded that Hall's procedures did violate the FMCSR, and that the arbitration awards upholding discipline under those procedures violated public policy. The court vacated all of the arbitration awards, ordered reinstatement and back pay to Gaibis, Lowry, and other unidentified employees, and ordered Hall's to implement a new dispatch and logging procedure created by the court.

The Court of Appeals vacated the district court's decision on the ground that Gaibis and Lowry had failed to state a claim upon which relief could be granted. In its Opinion by the Honorable Arlin M. Adams, the court below concluded that Gaibis and Lowry lacked standing to initiate an action seeking to overturn the arbitration awards for the reason that they had not alleged that the union breached its duty of fair representation, or that the grievance procedure was inadequate. The court noted that the administrative procedure afforded by the BMCS and the FHA, 49 C.F.R. §386.12, constituted the appropriate forum within which Gaibis and Lowry could have lodged their complaints concerning the dispatch and logging procedure.

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2. This Decision is included within the Appendix for Respondent, commencing at page A-1.

3. The Decision on the Petition for Reconsideration is included within the Appendix for Respondent, commencing on page A-35.

REASONS FOR DENYING THE WRIT

A. Summary of Argument

Petitioners assert that, contrary to the decision of the Third Circuit, an individual employee should be permitted to bypass his collective bargaining representative and to seek to overturn an arbitration award for reasons of public policy without alleging a breach of the duty of fair representation. Petitioners therefore request that certiorari be granted, on the grounds that prior decisions of this Court and other Courts of Appeals conflict with the holding of the Third Circuit. Alternatively, Petitioners seek review of the Third Circuit's decision in order to settle an issue which they allege has not been addressed previously by the Court.

Hall's respectfully submits that certiorari should not be granted in this case. This Court and the Circuit Courts have consistently and repeatedly held that an individual employee must be bound by the results of the grievance procedure unless he can establish that he was not fairly represented by his union in that procedure. Any other result would undermine the integrity of the collective bargaining process and the exclusive bargaining status of his union representative. These principles have been followed by every Court of Appeals which has considered the nature of the remedies available to an aggrieved employee under a collective bargaining agreement. Therefore, no conflict exists between the decisions of this Court, or any Court of Appeals, and the decision of the Third Circuit.

The fact that Gaibis and Lowry seek to overturn the arbitration awards in question on the basis of public policy does not affect this result. Although a union may assert a violation of public policy as one of a number of grounds for the vacating of an arbitral decision, this right is inherent in the union's status as exclusive bargaining representative. An employee, on the other hand, may ob-

tain such relief only if his union fails to represent him fairly. An employee should not be permitted to circumvent his collective bargaining representative, or to bypass the available statutory or administrative remedies for the asserted breach of public policy, in the guise of reviewing an arbitration award. Accordingly, this Court should deny the instant Petition for a Writ of Certiorari.

B. The Decision of the Third Circuit Is Consistent With Prior Decisions of This Court

Petitioners acknowledge that prior decisions of this Court clearly establish the general rule that an employee must allege a breach of the duty of fair representation in order to maintain an action against his employer to vacate an arbitration award. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983); *Hines v. Anchor Motor Freight*, 424 U.S. 554, 570-571 (1976). They nonetheless suggest that the holding of the Third Circuit below is in conflict with a number of decisions of this Court. Their Petition, however, fails to articulate the nature of that conflict. Indeed, there is no conflict; this Court has never held that an individual employee has standing to institute an action to vacate an arbitration award on public policy grounds, or on any other grounds, in the absence of an allegation of a breach of the duty of fair representation by his collective bargaining representative. The decision of the Third Circuit in the instant matter is fully consistent with prior decisions of this Court, including all of those cited in the Petition, as well as the federal labor policies underlying those decisions.

Congress declared in 1947 that "[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes . . . ." 29 U.S.C. §173(d). To effectuate that legislative policy, this Court long ago held that an employee must attempt use of the contract grievance procedure before seeking

relief in the courts under section 301. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965).[4] A contrary rule

> would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective bargaining agreements.'

Id. at 653, *quoting, International Brotherhood of Teamsters, Warehousemen & Helpers of America v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962).

This Court has further recognized that once a grievance has been processed through final and binding arbitration, the arbitration decision must be accorded finality in order that "the means chosen by the parties for settlement of their differences under a collective bargaining agreement [be] given full play." *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 566 (1960). Thus, a court is generally not permitted to review the merits of an arbitrator's decision; any other principle would permit the court to substitute its judgment for "the arbitrator's construction which was bargained for," *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).

The Union or the employer may seek to vacate an arbitration award only under narrow circumstances, *e.g.*, where the award does not draw its "essence" from the collective bargaining agreement. *Id.* at 597. The decision to seek to overturn the award, like the prior decision to

4. As noted by Petitioners, the Court did recognize that an employee could file suit individually against his employer under section 301 in *Smith v. Evening News Assoc.*, 371 U.S. 195, 198-200 (1962). However, that case did not involve a collective bargaining agreement which contained a final and binding grievance and arbitration procedure.

submit the grievance to arbitration, must be made on the employee's behalf by the union. This principle arises from a second critical policy of federal labor law, which accords a union exclusive bargaining representative status after its election by a majority of employees in the bargaining unit. If the union is to act effectively in that role, it must be permitted to exercise its judgment, subject to a duty of fair representation, in the handling of employee grievances in order to permit it "to participate actively in the continuing administration of the contract." *Republic Steel Corp. v. Maddox, supra*, 379 U.S. at 653. As the Court has noted,

> The settlement process furthers the interest of the union as statutory agent and as coauthor of the bargaining agreement in representing employees in the enforcement of that agreement . . . .
>
> If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the grievant to the vagaries of independent and unsystematic negotiation.

Vaca v. Sipes, 386 U.S. 171, 191 (1967). If an employee were permitted to take his claim to arbitration, or to seek to overturn the arbitration award without consent of the union, the union's status as exclusive bargaining representative and the stability of the collectively negotiated procedures would be jeopardized. *See DelCostello v. International Brotherhood of Teamsters, supra; Hines v. Anchor Motor Freight, Inc., supra.*

The employee is not left without a remedy, however, if the employer repudiates the grievance procedure or if the union fails to represent the employee fairly. In such

cases, the employee may seek to overturn an otherwise final decision arising from the grievance procedure. *Vaca v. Sipes, supra*, 386 U.S. at 185. As stated by the Court:

> The union's breach of duty relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures; if it seriously undermines the integrity of the arbitral process the union's breach also removes the bar of the finality provisions of the contract.

Hines v. Anchor Motor Freight, Inc., supra, 424 U.S. at 567.

The Third Circuit, in its Opinion below, followed the same principles of federal labor law, and adopted the same accommodation of competing interests, as has this Court in its prior decisions. The court below noted that the discharges of Gaibis and Lowry had been upheld in final and binding decisions, and that Petitioners had not alleged a breach of the duty of fair representation. As a result, Gaibis and Lowry could not challenge those decisions in the absence of an allegation that the integrity of the decisions was marred by a breach of the duty of fair representation. In so doing, the court below followed the long standing principle that a federal court should not interject itself into the collective bargaining process, where that process and the parties have functioned properly and fairly.

The Third Circuit also noted that the objections of Gaibis and Lowry to Hall's dispatch and logging procedure, which are statutory in nature, could have been presented through the procedures available under the FMCSR. 734 F.2d at 155 n.11. In so doing, the court below quite properly recognized the distinction between contractual and statutory violations. The arbitration awards in question held only that the actions of Hall's did not violate the contract; they dealt not at all with any statutory violation. *See Barrentine v. Arkansas Best Freight System*, 450 U.S. 728, 737 (1981). It would have

been inconsistent with all of the federal labor law policies discussed *supra* if the Third Circuit had permitted individual employees to impose on the parties to the contract a right or obligation founded not on their negotiation and agreement, but on the employees' view of what public policy demands those rights or obligations should be. If such a decision is to be made, it should be made by the union, the party responsible for the administration of the labor contract. An employee's statutory rights should be protected and enforced through statutorily created remedies.

Hall's submits that the accommodation struck by the Third Circuit is consistent with prior decisions of the Court, and furthers the critical labor principle that the union, and not an individual employee, is to be afforded full and unfettered authority to administer the collective bargaining agreement, subject always to a duty of fair representation. Accordingly, Hall's respectfully submits that the Petition for Certiorari should be denied.

C. The Decision of the Third Circuit Is Not In Conflict With Any Decision of Another Court of Appeals

Petitioners have cited several decisions of other Courts of Appeals which they allege are in conflict with the decision below, including an earlier decision by the Third Circuit. Upon careful review of these decisions, however, it is apparent that no Court of Appeals has adopted the view of the law espoused by Petitioners, and that no conflict exists with the decision of the Third Circuit.

As noted by Petitioners, several Courts of Appeals have recognized that an arbitrator's award may be overturned on the ground that the award violates public policy. *Perma-Line Corp. of America v. Sign, Pictorial & Display Union, Local 230*, 639 F.2d 890 (2d Cir. 1981); *World Airways, Inc. v. Teamsters Airline Division*, 578 F.2d 800 (9th Cir. 1978); *Ludwig Honold Mfg. Co. v. Fletcher*,

405 F.2d 1123 (3d Cir. 1969). These cases, however, involved a challenge by the union or the employer, rather than by an individual employee, to the arbitration award. As a result, the federal policies recognizing the exclusive representative status of the union and protecting the integrity of the collective bargaining process were not implicated in those decisions. Indeed, because those very policies were implicated in the instant case, the Third Circuit dismissed the employees' claim, despite its earlier decision in *Ludwig Honold Mfg. Co. v. Fletcher, supra*.[5]

Petitioners' principal argument appears to be that the Ninth Circuit has adopted a contrary position to that of the Third Circuit, citing *Christianson v. Pioneer Sand & Gravel Co.*, 681 F.2d 577 (9th Cir. 1982), and *Garibaldi v. Lucky Food Stores*, 726 F.2d 1367 (9th Cir. 1984). In *Christianson*, however, the Ninth Circuit held that a union is not an indispensible party to a Section 301 action by an individual employee who has alleged a breach of contract by the employer and a breach of the duty of fair representation by the union. That holding is consistent with *Vaca v. Sipes, supra*, for the Ninth Circuit simply stated that "the employee may make any requisite showing of unfair representation by the union in his suit against the employer." *Christianson v. Pioneer Sand & Gravel Co., supra*, 681 F.2d at 580. Thus, the court in *Christianson* held that an individual employee need not actually name his union as a defendant in an action to

5. Petitioners also cite *Banyard v. NLRB*, 505 F.2d 342 (D.C. Cir. 1974) in support of their claim that an individual employee may seek to overturn an arbitration award based on public policy without alleging a breach of the duty of fair representation. That case involved the National Labor Relations Board's decision to defer to an arbitration award which had found cause for discharge. The court held that the deferral to arbitration was improper because the allegations of the unfair labor practice charges raised an issue concerning the existence of concerted activity, which were properly before the NLRB. The court therefore remanded the case to the Board for consideration of the statutory issue.

vacate an arbitration award, so long as he alleges that the union breached its duty of fair representation in connection with that award. *Christianson* therefore does not conflict in any fashion with the decision of the court below.

Garibaldi is equally unsupportive of Petitioners' position. In that case, the Ninth Circuit found that a state court wrongful discharge action based on an alleged violation of public policy was improperly removed to federal court on the basis of section 301. The court held that the alleged tort was unrelated to the collective bargaining agreement, and was not preempted by federal law. Therefore, although the employee was attempting to vacate a final and binding arbitration award, the court found that Section 301 was an inappropriate vehicle for such a claim.

Contrary to Petitioners' contention, the Ninth Circuit has rendered two decisions which are fully consistent with the decision of the Third Circuit in the instant matter. In *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984), a case decided subsequent to *Garibaldi*, an employee claimed in a state court action that his discharge, which was upheld in final and binding arbitration, resulted from his complaints to the federal Mine Safety and Health Administration and the National Labor Relations Board, and therefore was in violation of public policy. The Ninth Circuit found that the case was properly removed to federal court pursuant to Section 301, and affirmed the dismissal of the claim by the lower district court. In so holding, the court stated:

> Olguin's exclusive remedies lay under the grievance procedures of the collective bargaining agreement and in federal remedies for retaliatory discharge. Olguin exhausted some of these remedies; he failed to pursue others in a timely fashion. He does not allege that his union breached its duty of fair repre-

> sentation; he therefore cannot maintain a Section 301 suit independent of the procedural requirements of the collective bargaining agreement.

Olguin v. Inspiration Consolidated Copper Co., supra, 740 F.2d at 1476.

The Ninth Circuit reached the identical conclusion in the earlier case of *Andrus v. Convoy Co.*, 480 F.2d 604 (9th Cir.), *cert. denied*, 414 U.S. 989 (1973), in which a group of employees sought to overturn an arbitrator's decision under Section 301, without alleging that they had been unfairly represented by their union. Citing a decision of the Fifth Circuit, the court held that

> employees cannot attack the final award, 'except on the grounds of fraud, deceit or breach of the duty of fair representation or unless the grievance procedure was a sham, substantially inadequate or substantially unavailable.'

Id. at 606, *quoting, Harris v. Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167, 171 (5th Cir. 1971).

In addition to the Ninth Circuit, the Courts of Appeals for virtually every Circuit have agreed with the Third Circuit that a breach of the duty of fair representation is a condition precedent to an individual employee's action under Section 301 to overturn an arbitration award. *See, Early v. Eastern Transfer*, 699 F.2d 552, 555n.3 (1st Cir.), *cert. denied*, 104 S.Ct. 93 (1983); *Santos v. District Council of New York City*, 547 F.2d 197, 201 (2d Cir. 1977); *Ostrofsky v. United Steelworkers of America*, 273 F.2d 614, 614-615 (4th Cir.), *cert. denied*, 363 U.S. 849 (1960); *Acuff v. United Papermakers and Paperworkers, AFL-CIO*, 404 F.2d 169, 171 (5th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969); *Fortune v. National Twist Drill & Tool Division, Lear Siegler, Inc.*, 684 F.2d 374, 375-6 (6th Cir. 1982); *Warren v. International Brotherhood of Teamsters*, 544 F.2d 334 (8th Cir. 1976).

These decisions were based on the federal labor policies recognizing the exclusive representative status of the union, and favoring private dispute resolution, discussed above. In dismissing a claim by individual employees seeking to overturn an arbitration award under Section 301 without alleging a breach of the duty of fair representation, the Fifth Circuit stated:

> In order to effectuate the purposes of the labor statutes employees are empowered to organize. This, of course, has resulted in enormous benefits but entails certain burdens as well. One of these is that to some extent the interests of particular individuals are subordinated to the interests of the group both at the contract negotiation stage and thereafter . . . . This is necessary if a union is to function efficiently. As a result, a union may properly determine not to pursue a member's grievance to the arbitration stage at all . . . . *It would be paradoxical in the extreme if the Union, which is authorized to decide whether a grievance is to be pursued to the arbitration stage at all, could not be authorized to assume full responsibility for a grievance it did pursue, without the intervention of the individual union members immediately concerned.*

Acuff v. United Papermakers and Paperworkers, AFL-CIO, supra, 404 F.2d at 171 (emphasis supplied). Accordingly, the court held that the claim of the individuals could not be heard unless coupled with an allegation of unfair representation. *Accord, Early v. Eastern Transfer, supra*, 699 F.2d at 555 n.3 ("we disagree with appellants insofar as they contend that an employee may ordinarily secure judicial review of the merits of a decision by a joint committee, as opposed to an arbitrator, even if the union did not violate its duty of fair repre-

sentation.")[6].

In light of the overwhelming authority in support of the decision of the Third Circuit, and the lack of any conflict among the Circuits, Hall's respectfully submits that certiorari should not be granted in this case.

D. The Decision of the Third Circuit Does Not Involve an Important Question of Law Which Should Be Settled by This Court

Petitioners' final argument is that certiorari should be granted because the instant matter involves an important question of law which should be resolved by this Court. Specifically, they argue that the decision of the court below would permit an arbitration award to violate public policy, without any individual recourse to vindicate such a policy, if the union were to decide in good faith not to challenge the award. The facts of the instant case reveal, however, that Gaibis and Lowry did have an independent means to challenge Hall's dispatch and logging procedure, and that the administrative agency responsible for enforcing the federal regulations at issue found that Hall's had not violated those regulations. Accordingly, no important question of law is involved herein,

6. The Seventh Circuit has allowed a limited exception to this principle, where employees sought to intervene in order to confirm an arbitration award, and the union had no objection to the employees' action. In *F. W. Woolworth Co. v. Miscellaneous Warehousemen's Union Local No. 781*, 629 F.2d 1204 (7th Cir. 1980), *cert. denied*, 451 U.S. 937 (1981), the district court had vacated an arbitration award which had reinstated three employees. Although the union had opposed the employer's action to vacate, it chose not to appeal the decision. The three employees thereafter sought to intervene in the action, in order to bring the appeal. The Seventh Circuit held that intervention was proper under those limited circumstances because intervention sought to strengthen the results of the grievance procedure, which were challenged by the employer. The court noted that intervention would not be appropriate, however, if the employees sought to overturn the award, or if the union opposed intervention. *Id.* at 1211-1212.

where Hall's procedures are consistent with the contract and with federal law.

In seeking to overturn their discharges, Petitioners allege that Hall's dispatch and logging procedures, upon which the discharges were based, violate public policy as embodied in the FMCSR. Gaibis and Lowry did not invoke the administrative remedies available under the FMCSR to challenge Hall's procedures, as the Third Circuit suggested they could do, under 49 C.F.R. §386.12. Instead, Petitioners sought to circumvent those specific remedies by articulating their claim as an action to overturn an arbitration award. It is perfectly clear, however, that Petitioners' claim is not premised on the collective bargaining agreement, but rather directly on the FMCSR; their claim is not *contractual*, it is *statutory*. Gaibis and Lowry cannot be permitted to avoid the careful administrative procedures established to resolve the identical safety issues which were the subject of the Complaint in the district court, simply by alleging a breach of contract premised on an alleged violation of public policy.[7]

Moreover, Petitioners' asserted claim that public policy has been violated by Hall's lacks support in the record. The Associate Administrator for Safety of the Federal Highway Administration expressly found that Hall's dispatch and logging procedures were in full compliance with the FMCSR, and that no threat to employee or public safety was presented (A-32). Indeed, the record shows that Hall's accident rate was under half of the national average for carriers of a similar size. *Vosch v. Werner Continental, Inc., supra*, 734 F.2d at 153 n.6. Gaibis and Lowry should not be allowed to circumvent their exclusive bargaining representative, and the grievance procedures established by the NMFA, simply by making an unsupported allegation of a public policy violation, which

7. Similarly, the Third Circuit concluded that Petitioners could not circumvent those administrative procedures by attempting to state a claim directly under the Interstate Commerce Act or the FMCSR. 734 F.2d at 153-154.

has been specifically contradicted by the agency responsible for ensuring the safety of the nation's trucking operations.

If Petitioners were permitted to maintain the instant action, any employee could avoid the restrictions inherent in the careful balancing of interests achieved by the federal labor law policies discussed herein, and disrupt the finality of labor arbitration awards, merely by invoking the words "public policy." Because virtually any arbitration award could be subject to such challenge, the federal policy favoring the rapid disposition of labor disputes would be eviscerated. *See, United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56, 63 (1981).

On the other hand, an employee in the position of Petitioners is adequately protected by his right to seek review of an arbitration award if the union fails to represent him fairly, *Vaca v. Sipes, supra,* 386 U.S. at 192, and by his right to pursue available administrative remedies independent of the labor contract. *See Olguin v. Inspiration Consolidated Copper Co., supra,* (employee had available federal statutory remedy for public policy claim; employee could not assert individual section 301 action without alleging breach of the duty of fair representation); *Local 453, IUEW v. Otis Elevator Co.,* 314 F.2d 25 (2d Cir.), *cert. denied,* 373 U.S. 949 (1963) (arbitration award reinstating employee could not be overturned based on violation of public policy which prohibits gambling; public policy upheld by application of criminal statute, not labor contract).

Hall's submits that the careful balancing of labor policies rendered by the Third Circuit, as well as all other Courts of Appeals that have considered the issue, and the availability of alternative remedies to Petitioners militate against the granting of certiorari in this case.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari to review the decision of the Court of Appeals for the Third Circuit be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

In the Matter of	:	Docket No. 81-65C
GAIBIS & WERNER CONTINENTAL (HALL'S MOTOR TRANSIT COMPANY)	:	

FINAL DECISION

The Recommended Decision of Administrative Law Judge Morton Needleman was served on all parties on January 22, 1982. As Final Decisions on all disputed issues brought under 49 CFR Part 386 are in the province of the Associate Administrator for Safety of the Federal Highway Administration, a Notice of my intention to review the recommended decision was issued on February 3, 1982. Subsequently, the Director of the Bureau of Motor Carrier Safety petitioned for the same review, and included a statement of his position of the issues addressed in Judge Needleman's decision along with some of the information I requested in my Notice of February 3.

I have also reviewed the original Notice of Investigation containing a copy of the referral from the United States District Court for the Western District of Pennsylvania; the replies to the Notice of Investigation; the transcripts of the proceedings before the Administrative Law Judge and all exhibits entered in connection therewith; the Post-Trial Briefs and replies thereto filed by the parties; the Proposed Findings of Fact, Argument, and Conclusion of Law filed on behalf of the BMCS Director; the Recommended Decision; the Petition for Review and Brief submitted on behalf of the Director; the Exceptions and Memorandum of Plaintiffs Gaibis and Lowry, et al.; and the Exceptions of Hall's to Recommended Decision. As a result of this review, and for the reasons stated in

the opinion below, I have accepted much of the recommended decision of Judge Needleman, but conclude that I cannot agree in all its findings and conclusions, and have therefore substituted my own.

Accordingly, it is my Final Decision, in responding to the issue certified by the District Court, that the dispatch and logging procedure followed by Hall's Motor Transit Company (and its predecessor) for its over-the-road drivers at its West Middlesex, Pennsylvania terminal does not violate the Federal Motor Carrier Safety Regulations, 49 CFR §390.1, *et seq.*

I. Background

In October, 1978, two drivers, then employed by Werner Continental, Inc., brought an action in the United States District Court for the Western District of Pennsylvania on behalf of themselves and other drivers purported to be similarly situated charging, *inter alia,* that the logging and dispatch procedures practiced by their employer violated provisions of the Federal Motor Carrier Safety Regulations (FMCSR). Werner Continental, Inc. subsequently merged into Hall's Motor Transit Company and will hereinafter be referred to as Hall's. The Bureau of Motor Carrier Safety (BMCS) an agency in the Federal Highway Administration of the United States Department of Transportation, is charged with the responsibility of promulgating, administering and enforcing the FMCSR. In an Order, dated April 27, 1981, District Court Judge Paul A. Simmons determined that the assistance of BMCS was required to aid the Court in resolving the issue related to the FMCSR. Accordingly, the issue was framed and certified to BMCS "for investigation and resolution in accordance with its Rules of practice and procedure."

Thereafter, on May 12, 1981, in accordance with the Rules of Practice for Motor Carrier Safety Proceedings, 49 CFR Part 386, a Notice of Investigation was issued by

the Director of the BMCS. An Administrative Law Judge was appointed and a Hearing was held on September 14 and 15, 1981.

II. Issues

The question certified by the U.S. District Court in its April 27, 1981 Order was as follows:

> "Whether the dispatch and logging procedure followed by Hall's Motor Transit Company for its over-the-road drivers at its West Middlesex, Pennsylvania terminal violates the Federal Motor Carrier Safety Regulations, 49 CFR §390.1 et seq."

The Court also requested that in resolving this issue, guidance be provided with respect to six enumerated matters:

> a) Following a required off-duty period, if a driver is required to be constantly available, such as by personally standing by his telephone to receive a dispatch assignment, and if he may be subject to discipline for absenteeism for failing to personally respond to such telephone calls, how must such time be logged?
>
> b) If the employer requires the time in question "a)" to be logged "off-duty" does this violate Federal Motor Carrier Safety Regulations?
>
> c) If a driver who was subject to discipline for not being personally available as set forth in (a), above, logged time at home waiting for a dispatch call as "on-duty not driving", is such logging procedure in compliance with F.M.C.S. Regulations?
>
> d) If the company requires time spent in waiting at home, as set forth in a), to be logged as "off-duty", yet reserves the right to discipline drivers for alleged absenteeism for not responding to dispatch

calls during this period, does this violate F.M.C.S. Regulations?

e) Whether Hall's has properly required said over-the-road drivers to log as "off-duty" the period of time during which the driver is subject to receiving a dispatch call by telephone?

f) Whether Hall's dispatch and logging procedure violates the maximum hours of service provisions of the Federal Motor Carrier Safety Regulations set forth in 49 CFR §395.1?

III. Findings of Fact

1. Hall's and its predecessor, Werner Continental have been operating as an interstate common carrier of property out of as many as 75 terminals in several States, including the West Middlesex terminal in Pennsylvania for the period from at least 1970 through the present (Tr. 21A, 203, 332, 365, 544 and 575).

2. Hall's has employed between 30 and 125 over-the-road drivers at the West Middlesex Terminal at various times over the years. It currently employs 70. (Tr. 577, 722, 748)

3. The over-the-road drivers at West Middlesex are represented by Teamsters Local 261. Working conditions and compensation are governed by a collective bargaining agreement which is enforced through a grievance mechanism (Tr. 476-8)

4. The trucking business engaged in by Hall's is highly competitive and success depends upon the ability to provide fast and reliable service (Tr. 480, 574).

5. Hall's uses a telephone dispatch procedure to notify drivers when to report for work (Tr. 578, A-30, GX-9, GX-10, GX-11), which is the common practice in the industry (Tr. 479, HX 44C), and requires drivers to be "on call" and available to accept a run unless it is during the 10 hour rest period immediately following the comple-

tion of a run (Tr. 29A, 585, GX-9, 10, 11); during the latter part of a work week when the driver may not have sufficient eligible hours available to complete a run (Tr. 580, GX-9, 10, 11); during a 24-hour period following that rest period, if reserved during that 10-hour period (Tr. 32A, 805, GX-9, 10, 11); or when "booked-off" with the permission of the terminal manager. (GX-9, 10, 11, Tr. 660). Drivers must report to the terminal within two hours of telephone notification (GX-9, 10, 11).

6. Road drivers at West Middlesex terminal are dispatched according to a strict "hog seniority" system which means that the most senior driver eligible to be called for a run must be called before any junior driver regardless of the number of work hours already performed during the work week (unless, of course it would force a driver over the legal limits) (GX-9, 10, 11, TR. 581). An exception to this rule is "foreign power courtesy" which grants a preference to drivers from other terminals delivering loads to West Middlesex. The courtesy is reciprocated throughout the system (Tr. 39A).

7. Under the collective bargaining agreement, the drivers are guaranteed 45 hours pay ($382.95 in May of 1977), per work week regardless of the availability of work, so long as they work at least one full day (Tr. 66) and remain continuously available for work (GX-28A). This guarantee can be lost through nonavailability (GX-28A, TGr. 67).

8. Hall's is also required under the agreement to pay fringe benefits on behalf of drivers at the West Middlesex terminal, e.g., pension fund contributions of $52 per month and health and welfare contributions of $177 per month per driver, so long as the drivers work at least 30 hours in a 30-day month. (Tr. 494).

9. In the event a driver is called out of strict seniority order for a load by the dispatcher, Hall's is liable to each passed over driver for the compensation he/she would have earned on the run. The issue is determined through a mechanism called a "run-around grievance."

10. When drivers are called, they are given a choice from whatever dispatches are currently available, but they must pick from what is available at the time they are called. They may not pick or pass, i.e., wait for a more favorable dispatch. (GX-9, 10, 11).

11. Because of the nature of the business, the readiness of loads for dispatch is unpredictable, so that drivers may be called at any time night or day (Tr. 25A, 480) with certain limited exceptions (Tr. 535).

12. Hall's maintains a number of records at its West Middlesex terminal to keep careful account of the availability of drivers for loads, including a line driver register card (also referred to as a log audit card) maintained at the dispatcher's desk (Tr. 29A, 579, 706, 738, 760, GX-30A).

13. Telephone calls from the dispatcher to a number furnished by the driver which result in no answer, busy signal, or driver not at home are the equivalent of absences and will be noted on the line driver register card (Tr. 81A, 222, 483, 514, 707-709).

14. There is no contention that runs are scheduled at such distances as could not be completed in less than 10 hours normal driving time. Drivers are required to book-off for 10 hours following the completion of a run during which time they are not eligible for work calls (Tr. 29dA, 324, 373).

15. Hall's reviews the absentee record of drivers periodically and based on the overall record, issues warning letters or takes disciplinary action against drivers. (TR 591-2, GX-19A through P, GX-20 A through P, GX-21A). The disciplinary action can range from suspension for one day to one week (GX-24A, D, E, G, I) to discharge (GX-24B and H) for chronic and habitual absenteeism (Tr. 22A, 203), which is a dischargeable offense under the union agreement (HX 39).

16. Plaintiff Lowry was discharged in December, 1979 (Tr. 202), at which time he was the first driver ever discharged by Hall's or its predecessor for absenteeism

(HX 39Z-5), and Plaintiff Gaibis was discharged on May 6, 1980 (Tr. 22A). No evidence of subsequent discharges for absenteeism appear in the record.

17. Only about one-third of the drivers at West Middlesex were issued warning letters or disciplined from November of 1974 through the date of the hearing (Tr. 597), and driver Caccia missed more work calls than any driver and still had not been discharged (Tr. 559).

18. Regarding availability for dispatch, drivers at West Middlesex in on-call status may provide the dispatcher with a number at which they can normally be reached (generally at home) (GX-9, 10, 11); or provide an alternate number where they may be reached when not at home; (Tr. 586, 706, 733, 829), or may stay in touch by calling the company (Tr. 586, 542, 547, 807); or by staying in touch with someone at home to find out if the company has called (Tr. 793); or by instructing someone at home to ask for and accept a dispatch when the company calls (Tr. 817, 830, 587, 612). This latter situation does not occur frequently because its availability is not widely known (GX-3, Tr. 91, 214, 345, 383, 417, 546, 796); nor encouraged by the company (GX-3, Tr. 179, 587-589, 648, 711, 724, 727); nor attractive to drivers because it would require them to report within two hours of the time the dispatch is received by the person answering Hall's call (Recommended Decision, pp. 20-21).

19. It is Hall's policy to book a driver off when it is brought to the company's attention that the driver is sick or fatigued at the time of dispatch (Tr. 598, 624, 737, 739), but Hall's discourages last minute book-offs (GX-9, 10, 11), and such book-offs are recorded as unavailability and considered in evaluating drivers' overall absentee record (Tr. 625), and may contribute to his being warned or disciplined (GX-21A).

20. No driver was able to testify that, although he was frequently fatigued at the time of dispatch, this condition was brought to the attention of Hall's (Tr. 110,

248, 349, 395, 452, 550), or that a dispatcher ever refused to book a driver off who complained of fatigue (Tr. 83, GX-21E, Findings of Fact No. 19).

IV. Answers to Propounded Questions

a. Time spent on general stand-by for a work call need not be logged as "on-duty" unless the requirements imposed by the employer are such that actively and unreasonably interfere with a driver's ability to rest. Since the regulations are principally concerned with accounting for "on-duty" time so as to prevent exceeding the limits, violations are only likely to occur when "on-duty" time is logged as "off-duty," and not vice versa.

b. Generally, such time may be logged as "off-duty" consistent with the safety regulations. The imposition of discipline for failing to respond to work calls is largely irrelevant unless it would directly interfere with the driver's ability to use the "off-duty" time to rest.

c. The logging procedure supports the hours of service limitation. If a driver logs time "on-duty not driving" when it would be permissible under the regulations to log such time "off duty," the maximum hours allowed to him in a particular time frame would be restricted beyond the intent of the rules, but would not necessarily equate to noncompliance with the regulations.

d. The arrangements between the company and its drivers concerning the use of off-duty time is only relevant to the regulations to the extent that the control exercised by the company alters the status of the drivers' time so that the ability of the drivers to use this time to get the needed rest is impaired. Consequently, holding a driver accountable for not meeting his/her obligation under the agreement could not *per se* be a violation of the FMCSR, nor could the requirement that the time available to the driver for rest and relaxation be logged as "off-duty."

e. It is normal and appropriate to log the time available for dispatch as "off-duty," and the circumstances in the case of Hall's and its predecessor do not alter that conclusion.

f. The dispatch and logging procedure employed by Hall's and its predecessor is designed, at least in part, to assure against violation of the maximum hours of service provisions of Part 395. The practices employed by the company in implementing the procedure do not, by their nature, frustrate the intent of the rule and consequently are not violations of the FMCSR.

V. Arguments

It is the contention of Gaibis and Lowry (the complaining drivers) that the FMCSR are violated in two principal ways as a direct result of Hall's logging and dispatching procedures.

First, it is contended that requiring drivers to log time spent eligible and waiting for a dispatch as "off-duty" is inconsistent with the definition of "on-duty time" in 49 CFR 395.2, and consequently misrepresents the actual hours of service performed by drivers. If this time were to be logged as "On-duty, not driving," drivers would routinely be exceeding the maximum hours of service permitted under 49 CFR 395.3. Moreover, although this is not a part of the drivers' contention, requiring drivers to log "on-duty" time as "off-duty" is tantamount to falsifying logs in violation of 49 CFR 395.8.

Next, Gaibis and Lowry contend that by requiring drivers to be available at all times while they are eligible for dispatch results very often in their being dispatched in a fatigued condition in violation of Section 392.3 of the FMCSR.

a. Section 395.2(a)

Regarding the first contention of Gaibis and Lowry, much depends on the meaning of "on-duty time" as used

in the FMCSR and accounted for on the driver's daily logs. The record is replete with correspondence between FHWA and several drivers, including Messrs. Gaibis and Lowry, beween FHWA and Hall's and between FHWA and members of Congress concerning this issue. (TX-1, TX-2, TX-3, TX-4d, TX-4e, TX-6(h), TX-7, TX-9, TX-10, TX-11, TX-14, TX-18, TX-19, TX-20, TX-21, TX-22, TX-25, TX-26, TX-32, TX-35, HX-5, HX-6, HX-7, HX-8, HX-13, HX-14, HX-15, HX-16, HX-18, HX-19, HX-20, HX-21, HX-22, HX-23, HX-24, HX-25, HX-28, HX-29, HX-30, HX-31, HX-32, HX-35, GX-2, GX-13, GX-14, GX-15, GX-16, GX-17, GX-18).

"On-duty time" is defined in the FMSCR, at §395.2 as: "All time from the time a driver begins to work or is required to be in readiness to work until the time he is relieved from work and all responsibility for performing work." The section goes on to enumerate nine instances of on-duty time, none of which could remotely be interpreted to include time spent at home waiting for a dispatch call. However, the nine categories are not intended to be all inclusive, and it is contended that the words ". . . is required to be in readiness to work . . .," sufficiently encompass that situation.

An official interpretation, published in the *Federal Register* on November 23, 1977 (42 FR 60078, at 60085), was intended to clarify the language of the regulation, as follows:

> "The purpose of (Sec. 395.2a) is to allow the driver opportunity to obtain adequate rest. This means that he must be relieved of all responsibility from work and be free to use the time effectively for his own purposes during that specified period of time.
>
> When a driver is required by a motor carrier to personally stand by to receive a telephone notice to report for work, following a required off-duty period,

> and the driver does in fact stand by, he meets the requirements of §395.2(a) and such time must be logged as on-duty time."

As the Administrative Law Judge observed, the weight generally afforded the official interpretations of an agency dissipates when the interpretations themselves are ambiguous. (Recommended Decision of A.L.J. at 32.). Subsequent communications from officials in the agency have elaborated on the interpretation to some extent by construing it to mean that if some alternative method of providing notice to drivers is available, there is no requirement "to personally stand by." By letter of July 13, 1979 (HX-31), Federal Highway Administrator Karl S. Bowers observed as follows:

> "Under the provisions of the FMCSR, a driver is "on-duty" when he is working, or required to be in readiness to work. A driver is considered to be *"on-duty"* if he is required to remain at a particular location to *personally* receive notification or instructions. *A driver is not considered to be "on-duty" if a third party may take a message for him, or if he is free to move around, but must keep the carrier notified as to where he can be reached."* (Emphasis in original).

In spite of the use of the alternative conjunction, "or," the Director argues that other communications (HX-22, for example) use the inclusive conjuction "and", which is more consistent with the official interpretation. Consequently, the Director believes the burden is on Hall's to prove that it provides all practical alternatives to personal availability, including "a viable third-party dispatch system," in order to remove the time drivers spend eligible and waiting for a dispatch from the definition of "on-duty time." (Director's Petition for Review and Brief, pp. 4-5)

Gaibis and Lowry, of course, would go even further. Their position is that any restriction imposed by the company on their freedom to use their time effectively for

their own purposes would require the logging of such time as on-duty. (Reply Memorandum of Plaintiffs Gaibis, Lowry *et al.*, p.2)

Much of the testimony at the hearing concerned the company's dispatch procedures, and whether alternatives to personal availability were provided. One such alternative, a "third-party dispatch system" received particular attention. Whence the term originated is not disclosed in the record, nor is its meaning, although it seems at times to be picked up as a term of art, particularly by the attorney for the Director. Of course, there is no requirement in the FMCSR, or anywhere else for that matter, that an interstate motor carrier must have a "third party dispatch system." Neither the official interpretation nor any of the correspondence between the FHWA and interested parties employ the term. Indeed, there is some disagreement as to its meaning. At least one dispatcher, Mrs. Eversole, indicated that to her, any message left with a third person at the number at which a driver was supposed to be available, was the equivalent of a third party dispatch (Tr. 752-3). In fact, much of the confusion surrounding the alleged "third party dispatch system" at Hall's could be attributed to the fact that it had never been referred to as such, in addition to the unwillingness of drivers to accept such a system coupled with a two-hour reporting requirement. (Findings of Fact, No. 18)

In short, I find that there is no such requirement implicit in the regulations or in any formal or informal interpretations of them. The statutory responsibilities transferred from the Interstate Commerce Commission to the Department of Transportation in 1967 (49 USC 1655 (e) and (f)) involved the safety of persons and property in interstate commerce. The whole purpose of the regulations is to promote the safe operation of motor vehicles in interstate commerce. The intent of Part 395 of the FMCSR is to assure that interstate commercial vehicle operators are sufficiently rested to prevent harm to

both of them, the property entrusted to their care, and the person and property of other users of the highway. Any attempt to regulate beyond that which is directly related to a safety concern, or to interpret a regulation beyond its effect of safety is without statutory authority and of no practical effect.

In *United States et al. v. American Trucking Associations, Inc. et al.*, 310 U.S. 534 (1940), that very issue was central to the Court's construction of Sec. 204(a) of the Interstate Commerce Act (ICA), the legislative authority for Part 395 of the FMCSR. The American Trucking Associations (ATA), on behalf of carrier members apparently wishing to escape to the extent possible the requirements of the newly enacted Fair Labor Standards Act (FLSA), petitioned the Interstate Commerce Commission to exercise its jurisdiction under §204(a) of the ICA to fix reasonable requirements with respect to the qualifications and maximum hours of service of all employees of common and contract carriers. 310 U.S. 534, at 541. Any employee with respect to whom the Commission had power to regulate qualifications and maximum hours of service under §204(a) was exempted from the provisions of the FLSA. The Commission had reached the conclusion, which it reaffirmed in response to the ATA petition, that its power under §204 was limited to prescribing qualifications and maximum hours of service for those employees "whose activities affect the safety of operation." *Ibid.* at 540. The Court, after considering a fair reading of the statutory language, the legislative history, and contemporaneous interpretations by the Commission held that the entire purpose of Congress in empowering the Commission with such discretionary power was "to promote careful operation for safety on the highway," and concluded:

> "Our conclusion, in view of the circumstances set out in this opinion, is that the meaning of employees in §204(a)(1) and (2) is limited to those employees

whose activities affect the safety of operation. *The Commission has no jurisdiction to regulate the qualifications or hours of service of any others.*" Ibid., at 553 (Emphasis Added)

Hall's argues persuasively that an agency must follow its own regulations, including both formal and informal interpretations of those regulations, and that such interpretations of an agency are to be afforded great weight. (Post-Hearing Brief of Hall's, pp. 24-28) The problem, though, is in interpreting the interpretations. Hall's believes they stand for the proposition that the requirement to stand by personally must be directly communicated by the company or else there is no such requirement. I have already noted the beliefs of Gaibis and Lowry, and that of the Director, both of which differ from each other and from that of Halls's.

It is important to note that none of the interpretations in the record are contemporaneous with the regulation itself, and the official interpretation was issued some 40 years after the regulation. It is worthwhile then to examine whether the interpretations are consistent with the purpose of the authorizing legislation.

As noted in the official interpretation of 395.2, "(t)he purpose of this rule is to allow the driver opportunity to obtain adequate rest." That purpose is entirely within the responsibility of the agency to carry out the safety aspects of the Interstate Commerce Act, transferred by the DOT Act, and specifically Sec. 204 thereof authorizing the regulation of "qualifications and maximum hours of service of (drivers)." (Compare *U.S. v.ATA*, supra.) This is accomplished by directing that any time during which the drivers's ability to obtain rest is impaired by requirements imposed by the employing carrier be accounted for as on-duty time. Thus, when the instructions of the employer direct the driver to stand by at a given location in order to perform some service to the employer which is currently within the conscious contemplation of both

parties, and which would frustrate or prevent the driver from obtaining rest, the time spent standing by must ordinarily be logged as on-duty time. Where, however, there is a general requirement of driver availability for call after a mandatory rest period which complies with the regulatory limits, there is no requirement that time spent being available in the event work materializes be logged as on-duty time. This is particularly so when the drivers through their collective bargaining representatives have agreed to the availability by telephone which is the long-standing practice for employment of over-the-road drivers (HX-44C, Findings of Fact, No. 3, 5 and 7).

There is no question that in some cases, the demands placed upon a driver by an employing carrier during time logged as "off-duty" are such that prevent that driver from obtaining sufficient rest. It is a common practice in the trucking industry for drivers to deliver a load, call the dispatcher, and be told to stand by in anticipation of another load materializing. Whether that stand-by time is compensated depends on the arrangement between the employer and employee. But regardless of compensation, the time must be logged as "on-duty, not driving" and be credited against the driver's hours of service in a given time period limited by Part 395 of the FMCSR.

That situation is far from the case here. Under Hall's dispatching system, and it is undisputed in the evidence presented by all parties, when a run is completed at the home terminal, the driver goes off duty for a minimum of ten hours. (Findings of Fact, No. 5 and 14) Thereafter, the driver continues in an "off-duty" status until he is called by the company and notified to report to work. Within two hours after the call, he must be at the terminal in readiness to work, at which time he is properly logged as "on-duty." (Findings of Fact, No. 5)

Gaibis and Lowry seize upon the language of several of the interpretations of §395.2 to support their position, i.e., "free to use the time effectively for his own purposes." (HX-16E, for example) Therefore, because of the

need to be available for a telephone notification, the driver's freedom is restricted to the point tha they cannot play golf, for instance, (TR. 661), or attend a movie (TR-662), or go to a picnic (TR-338), or operate a farm (TR 339). None of these activities is particularly conducive to rest, and whether a driver is "free" to pursue them is really of ... legitimate interest to the Department of Transportation."On-duty" for purposes of the FMCSR is not the same as "on-duty" for purposes of compensation, or a labor agreement, or any other bone of contention that may arise between employer and employee. To attribute such an interpretation to the rule would be conceding an authority to the rulemakers that they simply do not possess.

Unfortunately, the language of some of the interpretations could easily be understood to mean that "off-duty" time must be totally unrestricted. To the extent that such a regulation would exceed that which is required to accomplish a safety purpose, however, it would be beyond the scope of the authority of the DOT. Regulations must be interpreted in such a way that accomplishes the lawful purpose for which they are promulgated.

Assume, arguendo, that the drivers are correct, and 395.2 would require that all time spent on call after the tenth hour following the "statutory" rest period be logged as"on-duty" time. Under §395.3, *Maximum driving and on-duty time*, very few drivers would ever have sufficient hours available to accept a run. The absurdity of this conclusion is apparent from the drivers' own testimony. They could be on call anywhere from eight to fifty-four hours (Tr. 26, 344, 378) before receiving a call. All that time would have to be logged as "on-duty, not driving." Coupled with the ten-hour rest period (an expansion of the FMCSR requirement of eight hours), the contract requirement of a two-hour reporting time, the union sanctioned requirement that a driver have 22 available hours left at the time of dispatch, and considering the FMCSR

limitations of 15 hours in a 24 hour period, and 70 hours in an 8-day period, when would the drivers be permitted to drive? and how often? Of course, it could be argued that the system should be changed, and indeed maybe it should, but that is between the employer and the union, and not a matter to be resolved through interpretations of safety regulations.

Freedom to rest is the overriding consideration, and the safety purpose which empowers DOT to regulate the maximum hours of service. Consequently, the time that a driver is free from obligations to the employer so as to be able to use that time to secure appropriate rest is properly logged as "off-duty" consistent with Sec. 395.2. The fact that the driver must also be available to be called in the event he is needed at work, even under the threat of discipline for non-availability, does not by itself impair the ability of the driver to use this time for rest.

b. Unpredictability of Calls

The drivers further contend that the unpredictability of work calls coupled with the absence of alternatives to personal availability so restricts their movements that they are tied to the telephone and consequently more in service to the company than free to engage in activities of their own choosing. For the reasons stated in the discussion of §395.2, above, the regulations do not contemplate a complete absence of restriction on movement.

There are a number of factors contributing to the unpredictability of work calls. Most obvious is the fact that the loads ready for shipment are unpredictable and it is in Hall's interest to expedite the shipment as soon as it is ready in order to remain competitive in the industry. (Finding of Fact, No. 4). That this is also in the employees' interest is recognized by the union and is noted in the National Master Freight Agreement, Article 20, which has been interpreted during grievance and arbitration proceedings to mean that employees have an ob-

ligation to make themselves available for work at the time prescribed by the company (HX-44C). The "hog seniority system" has also been cited as contributing to the unpredictability of loads (Findings of Fact, No. 6; Post-Trial Brief of Plaintiffs, p. 4; Recommended Decision, p. 10). Certainly, the requirements imposed by this system do not inure to the benefit of the company. In fact, the whole telephone dispatch system can be said to have evolved in response to the FMCSR and the work rules negotiated by the union. (Findings of Fact, No. 5) Consequently, calls must be made in strict seniority order or the company will be liable to pay a driver it failed to call (Findings of Fact, No. 9), drivers are guaranteed a minimum wage, and contributions to unemployment insurance and health and welfare benefits regardless of the amount of work performed (Findings of Fact, No. 7, 8). In return, the drivers agree to be available, and if they are not, they can be disciplined, or suffer loss of benefits. (HX 39-2-1, HX-43I, HX-44C, interpreting the relative obligations under the contract of employment). The company gets little benefit from the strict rules of the telephone dispatch system, and, in fact, Hall's would not care who responded to a work call so long as somebody did. (TR. 601)

From all the testimony offered at the hearing, working conditions at the West Middlesex terminal have been less than ideal. The company mistrusts some drivers, some drivers mistrust the company. The work rules are examples of this mistrust, requiring a union steward to verify unanswered or busy calls, (GX-9, 10 and 11), and in the gradually increasing instances of warning letters and disciplinary actions. This is an unfortunate situation and detracts from a smooth running operation that would also enhance safety.

There is, however, evidence that work is not so unpredictable as some drivers (Gaibis, Lowry, Northcott, Logsdon) perceive. Three drivers were called to testify by the company, and presumably have no stake in the out-

come of the proceeding. Driver Bell testified that because of his seniority position (one behind Gaibis), he generally runs out of available hours in five days (Tr. 800, 801, 810) and some times in four days (Tr. 804) so that he stays pretty close to home during that time. He also testified that he is able to get some idea as to when he may be called by calling the dispatcher (Tr. 806, 7). Both Bell and driver Mennor received dispatches regularly through third parties (Tr. 794, 217), and driver Gustafson not only receives dispatches through a third party on occasion (Tr. 830), but testified: "The longer you have been there (Hall's), you have a pretty good idea when you're going to be called." There was also evidence that driver Caccia was able to manipulate the system to get his work in betwen Monday and Thursday (Tr. 699), and further, that dispatchers are instructed to be as cooperative as possible with drivers who call for information about dispatches (Tr. 690), and that information must be obtained through these calls is evident from the fact that virtually all drivers testified that they frequently call the dispatchers. The business agent for the union found that Hall's policy concerning absenteeism was more liberal than at another company (Tr. 480, 486), and in spite of all the testimony of rigid discipline concerning absenteeism, only two drivers, Gaibis and Lowry, have ever been discharged for that cause (Findings of Fact No. 16), and only about one-third of the drivers at West Middlesex received so much as a warning letter (Findings of Fact No. 17).

c. Sec. 392.3

Although Hall's logging and dispatch procedures do not wrongfully require drivers to log "on-duty time" as "off-duty" so as to violate or necessarily bring about violations of §§395.3 and 395.8, it is contended, and indeed the ALJ found, that the procedures are so onerous as to cause drivers to be dispatched in a fatigued condi-

tion in violation of §392.3. That section reads, in pertinent part, as follows:

> "No driver shall operate a motor vehicle, and a motor carrier shall not require or permit a driver to operate a motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue operate the motor vehicle."

No case has been brought to my attention, nor am I aware of any, where a carrier has been prosecuted under this section on the theory that the dispatching procedures cause drivers to be dispatched in a fatigued condition without some evidence that it actually happened at a specific time and place with the knowledge of the carrier.

The history of the rule, which dates back to 1936 when the original FMCSRs were issued, is not very helpful in determining its specific purpose, except that it was intended "to protect against the hazard of a driver whose ability or alertness is impaired through fatigue, illness or other cause." 1M.C.C.1(1936) It is, however, prosecutable only in a criminal proceeding under 49 USC 11914(b), (see also 49 USC 322(a)) as it does not involve recordkeeping. Thus, successful prosecution would require proof beyond a reasonable doubt that Hall's knowingly and willfully violated the regulation. Since we are dealing with issues more in a theoretical vein than an actual set of circumstances in which a carrier is alleged to have dispatched a driver in a fatigued condition, not only are the terms "knowingly" and "willfully" difficult to apply, but the quantum of proof "beyond a reasonable doubt" is very nearly impossible.

While many of the drivers testified that they had frequently been dispatched in a fatigued condition, none could state that they had actually brought the condition of fatigue to the attention of the dispatcher before ac-

cepting a run. (Findings of Fact, No. 20) Fatigue is a very subjective state of being, which is not, in the general sense, easily verifiable through objective observation. The FMCSR attempt to control the very dangerous problem of driver fatigue through restrictions on the number of hours drivers are permitted to operate in a given time period. This affords an objective measurement of the ratio of time worked and time off. The regulations create an obligation on both the employing carrier and the drivers to abide by the restrictions, and it is safe to say that enforcement of the obligations on the part of BMCS is, in the overwhelming majority of cases, carried out through inspections and audits of the driver's daily logs.

If Hall's procedures did in fact cause drivers to be dispatched in a fatigued condition, it must have been done with the knowledge of Hall's, and continued after such knowledge was acquired in willful disregard of its consequences in order for Hall's to be in violation of the regulations and, consequently, the underlying statute. The standards for determining whether an act is "knowing" or "willful" were set down by the U.S. Supreme Court in *United States v. Illinois Central R. R. Co.*, 303 U.S. 239. (See also *U.S. v. Paramount Moving and Storage Co.*, 479 F. Supp. 959, D. Fla. 1979) After establishing that there is a distinction between "knowingly" and "willfully," the Court went on to say: "So giving effect to these considerations, we are persuaded that it (i.e. "willfully") means purposefully or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." *Ibid*, at 242-243.

There is no dispute that Hall's knew about the requirements in the regulations, and if any of its agents (e.g. dispatchers, terminal managers, Director of Industrial Relations) knew that drivers were being dispatched in a fatigued condition, that knowledge would be imputed to Hall's. *Steere Tank Lines, Inc. v. United States*,

330 F. 2d 719 (5th Cir. 1963); *Riss & Co. v. United States*, 262 F. 2d 245 (8th Cir. 1958); *United States v. Sawyer Transport, Inc.*, 337 F. Supp. 29 (D. Minn. 1971).

In *United States v. T.I.M.E.—D.C., Inc.*, 381 F. Supp. 730 (W.D. Va. 1974), a carrier was prosecuted under Sec. 392.3 for two alleged instances of dispatching drivers in ill condition. In a situation similar to the one here, the company had been experiencing increased absenteeism at one of its terminals. To combat the condition, the company initiated a policy whereby a driver calling in to be booked off as sick would be charged with an unexcused absence unless he later produced a doctor's slip. Subsequently, one driver called in complaining of a back injury and was informed by the dispatcher that he would be booked off, but would be charged with an unexcused absence. Within an hour, the driver changed his mind, notified the dispatcher of his availability, and later reported to work, accepted a dispatch and completed it without reported problems.

A second incident occurred about a month and a half later when a driver called to be marked off because of an ear problem. Three hours after being informed of the company policy, he called back and requested to be placed back in the lineup and was dispatched later that evening. After traveling about 110 miles, the driver became nauseous, telephoned the company for relief, and was treated at a hospital for an inner ear infection. There was conflicting evidence as to whether either driver had in fact been made aware of the opportunity to have the unexcused absence later changed to excused upon submission of medical verification.

The Court found the company not guilty with respect to the first violation, and guilty with respect to the second. The rationale for distinguishing between the two incidents was based on the level of knowledge and willfulness on the part of the company, attributable to each. In the time frame between the two incidents, there was apparently much confusion and discontent relative to the

coercive effect of the policy which eventually matured into a grievance. Whereas the company could not have been chargeable with knowledge of the likely effects of its policy in the earlier incident, it had notice sufficient to cause it to examine its policy more closely by the time the second occurred. The "willfulness" requirement for conviction was found in the company's conscious disregard for its affirmative obligation "not to 'require or permit' drivers to operate their vehicles while impaired." By leaving adherence to the regulation almost entirely the responsibility of its drivers, the Court concluded that the company beyond a reasonable doubt had willfully disregarded its duty under §392.3.

While there are many similarities between the *T.I.M.E. — D.C.* case and the instant proceeding, there are also several important distinctions. In *T.I.M.E. — D.C.*, there were specific instances where particular drivers were dispatched after notice of possible health problems, and there was verifiable medical evidence that the second driver was indeed dispatched in a condition where his illness was such that made his "ability or alertness (to be) so impaired, or so likely to become impaired as to make it unsafe for him to begin or continue to operate the motor vehicle." (49 CFR 392.3) In this case, there are the driver's subjective and self-serving claims that they were routinely in a fatigued condition when dispatched, yet in each instance that a driver claimed he was fatigued at the time of dispatch, he also denied that he had informed Hall's of his condition.

On this issue, the testimony of the drivers is very interesting. On cross-examination, Mr. Gaibis, the plaintiff in the principal lawsuit who had been fired by the company for chronic absenteeism, and who had been conducting a campaign of letter-writing to the company and to the BMCS on many aspects of the work rules since 1972 (GX, HX, and TX), testified as follows (Tr. 100-111):

"(Mr. Milone): Now, Mr. Gaibis, you have never been forced to drive a truck by Hall's in a fatigued condition; have you?

"(Mr. Gaibis): Well, that's—I would say the end of the disciplinary action applied to under work rules, yes, and the method it was dispatched.

"Q. Was there ever an occasion where you received a dispatch call and told the dispatcher you were too fatigued or too tired to drive and you were forced to take that call?

"A. Not that I can remember.

"Q. What is Hall's policy concerning dispatching fatigued drivers?

"A. The only thing I can refer to is the work rules, and drivers may not report off at the time of call.

"Q. My question is, what is Hall's policy with respect to dispatching fatigued or tired drivers; do you know?

"A. There's nothing in the work rules that has anything.

"Q. You don't know what it is; do you?

"A. As far as the work policy is—rules are concerned, no.

"Q. You never inquired to anyone at Hall's what the company's policy for dispatching tired drivers was?

"A. No.

"Q. You never asked whether you were permitted to turn down a dispatch call because you were too tired or too fatigued to drive; did you?

"A. Personally?

"Q. Yes.

"A. Like I say, I don't think. I don't think I ever called in—

"Q. My question is, did you ever ask anyone what the policy was with respect to the driver being permitted to turn down a dispatch call because he was too tired or too fatigued to drive; did you ever ask anyone at Hall's what that policy was?

"A. No.

"Q. Yet, by your own testimony, you drove in a fatigued condition quite frequently?

"A. Yes.

"Q. Almost all the time? Almost every time you went out you considered yourself too fatigued to drive; didn't you?

"A. I think I said mostly every time.

"Q. Mostly every time. Yet, you went out; correct?

"A. Yes.

"Q. And yet, you did not tell the dispatcher you're too fatigued?

"A. No, I didn't.

In addition to bringing Mr. Gaibis' credibility into serious question, that testimony sheds some light on the perception of the fatigue problem, the knowledge to be attributed to the company, and the relative responsibility of the company and the drivers. While *T.I.M.E. — D.C.* intimated that constructive knowledge on the part of the company could not leave responsibility for adherence entirely to the drivers, we must assume from the wording of the regulation that there is a shared responsibility. Compare the testimony of driver Bell, whose role can be fairly described as disinterested (Tr. 796):

"(Mr. Tierney): Kr. Bell, have you ever been dispatched in a fatigued condition?

"(Mr. Bell): Yes, I have.

"Q. Have you brought this condition to the attention of the dispatcher?

"A. I have at times, depending on how I felt. If I felt as though I could go out and sleep on the road an hour or two, I generally would go ahead and do it. If I feel as though I cannot do it, I would tell the dispatcher, which has happened at times, and he'll tell me to call back when you are ready.

"Q. Have you ever been disciplined for booking off at the time of dispatch call?

"A. I imagine my card might have been marked, but I have never been disciplined; no."

With respect to this issue and as an indication of the motive of the drivers, compare the testimony of Mr. Mennor, another relatively disinterested driver (Tr. 818-819).

"(Mr. Tierney): Have you ever been dispatched in a fatigued condition?

"(Mr. Mennor): Yes.

"Q. When you were dispatched in a fatigued condition, did you call it to the attention of anyone at Hall's?

"A. No. I figured I would start and drive a few hours and catch an hour sleep or something and finish the trip.

"Q. Is it permitted in your experience by Hall's work rules?

"A. No, it ain't permitted.

"Q. Did you receive any disciplinary action as a result of doing that?

"A. No, and never had any.

"Q. Never had any disciplinary action?

"A. No.

"Q. Why did you (not) tell the dispatcher that you were fatigued at the time you accepted the dispatch?

"A. Well, I wanted to make the trip."

and another driver, Mr. Gustafson (Tr. 832-833):

"(Mr. Tierney): Have you ever been dispatched in a fatigued condition?

"(Mr. Gustafson): Yes, I have.

"Q. Did you bring it to the attention of anyone at Hall's or Werner Continental?

"A. No, because I wasn't that fatigued that I couldn't handle it. I mean, I knew—I knew that I was tired but I wasn't wiped out fatigued that I would be a danger on the highway.

"Q. So you weren't so tired that you felt that it was unsafe for you to drive?

"A. No; otherwise, I would have refused the call.

"Q. Have you ever (refused) a call for being fatigued

"A. Yes, I have.

"Q. How did you go about doing that?

"A. I generally knew—you have—there again, it's a matter of experience. The longer you have been there, you have a pretty good idea when you're going to be called. I knew if I hadn't had proper rest prior to my work call, I would have called the dispatch and booked off.

"Q. Have you ever received any discipline for doing that?

"A. No.

It seems clear from the drivers testimony that the prime motive for accepting a dispatch, even in a "fatigued" condition, is to earn money. And it is equally clear that if they notified the dispatcher at the time of dispatch that they were fatigued, they would not be assigned the run. The regulations prohibit the drivers from operating a motor vehicle while in an impaired condition which creates an affirmative duty on their part to decline to drive, or at the very least, to call the attention of the employer to their fatigued condition. By their own admissions, the drivers have on many occasions failed in their obligation. But, as was true in *T.I.M.E. — D.C.*, the employing carrier is not relieved of its obligation to refuse to permit a driver to operate a vehicle while his condition is impaired due to fatigue when it reasonably should have knowledge of such condition. To be sure, Hall's has been aware for many years of the dissatisfaction of several of its drivers with the dispatch system, and their complaints that the system creates a safety problem. Is this sufficient notice to the carrier in the event a driver is dispatched "while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness or any other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle"? I think not.

Without actual notice, some other "means to know" must have been available to the company in order to create criminal liability. *T.I.M.E. — D.C., supra*, p. 739 (citing *Steere Tank Lines, supra; Riss & Co., supra;* and *U.S. v. Sawyer, supra.*) The Court, in *T.I.M.E. — D.C.*, relied upon the recentness of the change in company policy, the drivers' complaints that the policy was likely to have a significant effect upon a driver's decision to mark-off, and the actual notice of driver Brown that he was too ill to drive to draw the conclusion that the company had the "means to know" by adopting a more realistic approach to its no mark-off rule. *Ibid,* p. 740.

Hall's, on the other hand, has had the procedures complained of in place for many years, has twice undergone investigations by BMCS which found no violations of the regulations, had no actual notice of fatigue from a single driver it subsequently dispatched, and had a policy which required book-off upon information that a driver was too fatigued. Its no book-off at the time of dispatch rule certainly did not invite notice of fatigue, but its policy afforded ample opportunity for a driver to decline to accept a dispatch in a fatigued condition.

There is no evidence that safety problems existed which would have indicated to Hall's that drivers were operating in a fatigued condition. One driver, Logsdon, testified that he had had a minor accident as the result of falling asleep while driving (Tr-341), but he did not say that Hall's was made aware of the accident, and, in fact, intimated that he made the repair himself without telling Hall's. There is, however, no evidence that Hall's was experiencing an abnormal number of accidents that would have alerted it to a problem. BMCS records indicate that the accident rate of Hall's is well below the national average for carriers of similar size. Data available in the BCMS Management Information System indicate that in 1979, Hall's experienced 0.425 accidents per million miles travelled. The average for common carriers with a fleet size similar to Hall's is 0.934 accidents per million miles, and for all common carriers is 1.406 accidents per million miles.

Finally, in my Notice of Review, I requested the Director to furnish information concerning the enforcement experience with Sec. 392.3. Part of this information was furnished in the Director's Petition for Review and Brief, pp. 6-13. I have subsequently been informed that BMCS records of enforcement cases by regulations section violated is automated only since April, 1981, and that since that time, in over 29,000 violations cited, none have been for violation of 392.3. Other than the *T.I.M.E. —D.C.* case, no cases have been brought to my attention,

nor am I aware of any, that have been brought under 392.3. This is not surprising. BMCS enforcement cases require a high degree of documentation, and even in the *T.I.M.E. —D.C.* case, it is extremely doubtful whether the charge could have been sustained without proof of the ill condition of the driver dispatched. Proof of a fatigued condition has never, to my knowledge, been tested, although it is conceivable that under the right circumstances such a condition could be demonstrated. Consequently, I would not conclude that the rule as applied to fatigued drivers is of no effect.

As the Director observes:

> "The problem of driver fatigue is a recurring one in the trucking industry. The Bureau of Motor Carrier Safety deals with the problem primarily through its hours of service regulations. Those regulations are designed to ensure the driver is given sufficient time off from work to obtain adequate rest. The regulation cannot, and should not, regulate the driver's activity during that off-duty period. On the other hand, the hours of service regulations cannot operate in a vacuum. Real life situations must be recognized and supplemental measures provided in a further attempt to eliminate unsafe operations. One of the supplemental measures is the regulation prohibiting the dispatching of ill or fatigued drivers."

Petition for Review and Brief, p. 11-12.

I do conclude, however, that there has been insufficient evidence produced in this case to sustain a charge that Hall's knowingly and wilfully dispatched drivers in impaired condition due to fatigue, or that its dispatching procedures were such that caused drivers to be dispatched in such condition with the knowledge of Hall's, and that Hall's disregarded the consequences of its procedures, which it should have known, in violation of Sec. 392.3 of the FMCSR.

The changes to its dispatch procedures adopted by Hall's in its notice of January 18, 1981 (GX-11) should provide more opportunity for drivers to book-off without threat of discipline and should improve the working conditions. However, so long as the industry continues to structure its operating practices on such keen competition as requires so high a degree of availability on the part of its drivers, a problem will remain.

VI. Conclusions

1. Hall's dispatching procedures do not violate Part 395 of the FMCSR.

2. Hall's procedures do not require drivers to log time as off-duty that should rightfully be logged as on-duty.

3. The FMCSR do not preclude a carrier from requiring its drivers to be available for work calls during off-duty hours so long as the ability of the drivers to obtain rest is not unreasonably impaired.

4. Hall's dispatch system allows sufficient flexibility so that drivers are able to control their free time in order to obtain adequate rest, and to refrain from accepting work calls in a fatigued condition.

5. Hall's does not dispatch drivers who are fatigued if such condition is known at the time of dispatch.

6. Hall's dispatch procedures and disciplinary system are not so onerous that drivers are necessarily required to accept work calls in a fatigued condition.

7. The FMCSR are an inappropriate vehicle for resolving disputes between employers and employees concerning the relative obligations of each, except to the extent that practices violate or threaten violation of the safety requirements in those regulations.

Lorenzo Casanova
Associate Administrator for Safety

Dated: March 29, 1982

CERTIFICATE OF SERVICE

This is to certify that on this 29th day of March, 1982, copies of the foregoing Decision and Order has been sent to the following:

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A-34

Federal Highway Administration
Department of Transportation
Washington, D.C. 20590

Dated: March 29, 1982

Judith A. Morrin
Secretary

BEFORE THE
FEDERAL HIGHWAY ADMINISTRATION

In the Matter of	:	Docket No. 81-65C
GAIBIS & WERNER CONTINENTAL (HALL'S MOTOR TRANSIT COMPANY)	:	

DECISION ON PETITION FOR RECONSIDERATION

Messrs. Gaibis and Lowery (hereinafter "Plaintiffs") filed a Petition for Reconsideration of the Final Decision of former Associate Administrator Lorenzo Casanova in the captioned matter. Hall's Motor Transit Company (formerly Werner Continental, and hereinafter "Hall's") opposed the Petition, while the Director, Bureau of Motor Carrier Safety, took no position with respect to it. The Plaintiffs' Petition alleges no new facts or developments which were not available in the record on which Mr. Casanova's decision was based, and the argument that the procedures followed in complying with the District Court's Order were defective is not persuasive. The Petition is accordingly denied.

Plaintiffs assertion that the Federal District Court Judge did not suggest any procedural guidelines is patently erroneous. The remand Order of Judge Simmons of the United States District Court for the Western District of Pennsylvania certified a question to the Bureau of Motor Carrier Safety in the Federal Highway Administration "for investigation and resolution in accordance with its rules of Practice and procedure." The Rules of Practice for Motor Carrier Safety Proceedings are promulgated in Part 386 of Title 49 of the Code of Federal Regulations and are entirely consistent with the requirements of the Administrative Procedures Act, 5 USC 557. The Plaintiffs are correct that the circumstances in this case, i.e. the referral from the District Court, are unique

within the Federal Highway Administration. Because of this, we are even more constrained to follow the directions of the Court precisely, and to apply the appropriate procedures assiduously.

Plaintiffs do not argue that the Associate Administrator did not apply the Rules of Practice for Motor Carrier Safety Proceedings, but rather seem to argue that it was unnecessary to apply them consistently. Therefore, according to the Plaintiffs, while it was appropriate to appoint a Hearing Officer under the rules, it was inappropriate to modify or set aside the Hearing Officer's decision. The extent of the modification of that decision is also exaggerated by the Plaintiffs. In fact, the first portion of the Final Decision is entirely consistent with the conclusion of the Hearing Officer in the Recommended Decision that Hall's logging and dispatch procedures do not violate Sec. 395.3 of the Federal Motor Carrier Safety Regulations (FMCSR). It was with the more general proscription in Sec. 392.3 that Associate Administrator Casanova felt obliged to disagree with Administrative Law Judge Needleman.*

Plaintiffs contend that Mr. Casanova applied the wrong burden of proof to the issue whether there were, in fact, violations of Sec. 392.3 caused by Hall's logging and dispatch procedures. This issue is discussed thoroughly in the Final Decision, pp. 21-33, and Plaintiffs raise no legal arguments to refute the reasoning developed therein. Similarly, Plaintiffs' contention that the alleged failure of the Final Decision to address "properly" one of the questions posed in the remand order amounts to a procedural error is without legal support. The six "matters" enumerated by the Court on which it sought

* The Director, BMCS, incidentally, differed with Administrative Law Judge Needleman on both points (See Proposed Findings of Fact, Argument and Conclusions of Law), Plaintiffs intimation, therefore that the Final Decision overrules a consistent position of both the Administrative Law Judge and Director is grossly misleading.

"guidance" were thoroughly discussed throughout the Final Decision. A summary of the agency's response in each of these matters was provided, and whether those responses are sufficient to meet the needs of the District Court is better left to Judge Simmons to decide.

Plaintiff's claims of substantive defects in the Final Decision amount to no more than a disagreement with the outcome. They make no new arguments or raise issues that were not already thoroughly developed and exhaustively briefed during the hearing and review process. I am satisfied that my predecessor more than adequately addressed all of these matters in his comprehensive review of the record, and that his Final Decision reflects thoughtful consideration leading to a logical conclusion with which I am in agreement.

WHEREFORE, the Petition for Reconsideration is hereby DISMISSED, and the Final Decision of the Associate Administrator remains the Final Decision of the Agency.

Marshall Jacks, Jr.
Associate Administrator for Safety,
Traffic Engineering and
Motor Carriers

Dated: May 27, 1982

CERTIFICATE OF SERVICE

This is to certify that on the 27th day of May, 1982, copies of the foregoing Decision on Petition for Reconsideration has been sent to the following:

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Dated: May 27, 1982

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